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How Tribe and State Cooperative Agreements Can Save the Adam Walsh Act from Encroaching on Tribal Sovereignty

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HOW TRIBE AND STATE COOPERATIVE AGREEMENTS CAN SAVE THE ADAM WALSH ACT FROM ENCROACHING UPON TRIBAL SOVEREIGNTY

I. INTRODUCTION

President George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006 (AWA) into law on July 27, 2006.[1] Congress passed the AWA to expand the national sex offender registry, strengthen federal penalties for crimes against children, and prevent sexual predators from reaching children on the internet.[2] To achieve these purposes, the AWA requires that states, territories, and Indian tribes maintain sex offender registration and notification programs; punishes those sex offenders who fail to comply with such registration programs; and limits access to child pornography.[3]

Although the AWA has inspired growing academic dialogue since its enactment in 2006,[4] it has inspired little academic criticism on behalf of American Indian tribes.[5] Indian tribes have challenged that section 127[6] of the AWA encroaches upon existing federal Indian law and policy promoting tribal sovereignty.[7] On one hand, "non-Public Law 280 tribes"[8] have argued

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1. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, (2006) (to be codified at 42 U.S.C. § 16901). The AWA honors John and Reve Walsh for their dedication to the well-being and safety of America's children and marks the 25th anniversary of the abduction and murder of their son, Adam Walsh. *Id*. § 2.

2. *See* Press Release, The White House, Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html (last visited Jan. 15, 2009).

3. Pub. L. No. 109-248, §§ 111(a), 112, 113, 117, 504, 120 Stat. at 593–94, 629 (to be codified at 42 U.S.C. §§ 16911–13, 16917; 18 U.S.C. § 3509). The sex offender registration and notification requirements constitute the Sex Offender Registration and Notification Act (SORNA). § 101, 120 Stat. at 190 (to be codified at 42 U.S.C. § 16901).

4. *See, e.g.*, Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008); Caitlin Young, Note, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children it is Trying to Protect*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459 (2008).

5. A review of law review articles that have discussed the AWA revealed only two articles that have discussed the AWA as related to Indian tribes. *See* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post*-Booker, 91 MARQ. L. REV. 723, 794 n.414 (2008); James Park Taylor, *Bespeaking Justice: A History of Indigent Defense in Montana*, 68 MONT. L. REV. 363, 410 (2007).

6. § 127, 120 Stat. at 599 (to be codified at 42 U.S.C. § 16927).

7. *See, e.g.*, The Nat'l Cong. of Am. Indians, *Urging Congress to Amend Section 127 of the*

that the AWA threatens to encroach upon tribal sovereignty because tribes must retrocede sex offender registration and notification responsibilities where they fail to comply with the AWA.[9] On the other hand, "Public Law 280 tribes" have argued that the AWA extends beyond the scope of criminal/prohibitory and civil/adjudicatory jurisdiction delegated to states under Public Law 280.[10] Furthermore, tribes have argued that Congress passed the AWA without any tribal input.[11]

This Comment proposes that because the AWA threatens the tribal sovereignty of both non-Public Law 280 and Public Law 280 tribes, Congress should amend the AWA to require tribe and state cooperative agreements to carry out AWA sex offender registration and notification functions.

Part II examines the development of tribal sovereignty as qualified by the federal trust relationship. It addresses current federal and state criminal and civil jurisdiction over Indian country, which qualify tribal sovereignty in the name of the federal trust relationship. It concludes by discussing Public Law 280, which delegated to several states criminal/prohibitory and civil/adjudicatory jurisdiction over Indian country and severely qualified tribal sovereignty in the name of the federal trust relationship.

Part III examines both non-Public Law 280 and Public Law 280 tribes' argument that the AWA encroaches upon current federal Indian law and policy promoting tribal sovereignty. Part III suggests that the AWA threatens tribal sovereignty in non-Public Law 280 states because the AWA may retrocede sex offender registration and notification responsibilities to the state, where non-Public Law 280 tribes fail to comply with the AWA's requirements. It recognizes, however, that section 127 does not extend beyond the scope of criminal/prohibitory and civil/adjudicatory jurisdiction delegated to states over Public Law 280 tribes, where courts construe the AWA registration provisions as a criminal/prohibitory law. Nonetheless, Part III suggests that the federal district courts' response to Ex Post Facto Clause challenges to the AWA, finding the AWA registration provisions a civil law, does support Public Law 280 tribes' argument that section 127 extends beyond the scope of jurisdiction delegated to states under Public Law 280.

Adam Walsh Act, Res. #ECWS-07-003 (Feb. 26, 2007), http://ncai.org/ncai/resource/documents/governance/Adam_Walsh_Act/07-003_Adam_Walsh.pdf [hereinafter NCAI Resolution].

8. *See infra* text accompanying notes 53–64 (explaining Public Law 280).

9. Sarah Deer, *Widening the Gap: Adam Walsh Act Raises Concerns*, INDIAN COUNTRY TODAY, Mar. 28, 2007, at A3.

10. *Id*.; *see also* NCAI Resolution, *supra* note 7.

11. The NCAI notes, "[The AWA] addresses Indian tribes and was included without any hearings, consultation or consideration of the views of tribal governments and current tribal practices." NCAI Resolution, *supra* note 7.

Part IV proposes that Congress should consider amending section 127 of the AWA to (1) strike the provision that unilaterally delegates sex offender registration and notification responsibilities to Public Law 280 states and (2) require that both non-Public Law 280 and Public Law 280 tribes and states adopt cooperative agreements to establish sex offender registration and notification programs that comply with the AWA. Part IV encourages Congress to follow the footsteps of the Indian Gaming Regulatory Act (IGRA) and again resolve tribe and state jurisdictional conflict by requiring cooperative agreements. It suggests that amending section 127 would permit tribes and states to develop "custom-fit" sex offender registration and notifications programs that comply with AWA. It concludes in suggesting that amending section 127 would ultimately promote current federal Indian law and policy promoting tribal sovereignty.

II. TRIBAL SOVEREIGNTY AS QUALIFIED BY THE FEDERAL TRUST RELATIONSHIP

Part II examines the development of tribal sovereignty as qualified by the federal trust relationship. Subpart A examines the roots of tribal sovereignty and the federal trust relationship. Subpart B examines current federal and state criminal and civil jurisdiction over Indian country, which qualify tribal sovereignty in the name of the federal trust relationship. Subpart C discusses Public Law 280, which delegated to several states criminal/prohibitory and civil/adjudicatory jurisdiction over Indian country and greatly qualified tribal sovereignty in the name of the federal trust relationship.

A. The Roots of Tribal Sovereignty and the Federal Trust Relationship

From as far back as 1787, Indian tribes have been concerned with protecting their tribal sovereignty from federal and state encroachment.[12] Broadly speaking, sovereignty is "[s]upreme dominion, authority, or rule."[13] Specifically, sovereignty includes the recognition by others as a sovereign, a land base, the power of self-defense, a treaty-making power, an economic system, and the lack of subordination to other sovereigns.[14] However, tribal sovereignty is qualified sovereignty—it yields to the plenary power of Congress and, in turn, the federal trust relationship.[15] To date, tribes' right to

12. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 6 (3d ed. 2004).

13. BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

14. *See* PEVAR, *supra* note 12, at 12–13.

15. PEVAR, *supra* note 12, at 32 (As originally conceived by the United States Supreme Court, the federal trust relationship constitutes the bargain between tribes and the U.S. government—in exchange for millions of acres of tribal land, the government promised to provide tribes protection; respect; and food, clothing, and services.); *see also* United States v. Wheeler, 435 U.S. 313 (1978);

determine tribal membership is the only tribal sovereignty attribute consistently upheld in federal Indian law and policy.[16] Nonetheless, since the 1960s, existing federal Indian law and policy have favored tribal sovereignty.[17]

Qualified tribal sovereignty dates to early nineteenth century United States Supreme Court decisions.[18] In just over ten years, Chief Justice John Marshall penned what federal Indian law scholars commonly refer to as "The Marshall Trilogy":[19] *Johnson v. M'Intosh*,[20] *Cherokee Nation v. Georgia*,[21] and *Worcester v. Georgia*.[22] These three decisions would become the foundation for qualified tribal sovereignty.[23]

Johnson v. M'Intosh did not speak directly to the notion of tribal sovereignty, but it established Indian Title or Aboriginal Title, the right to occupy lands from "time immemorial."[24] As "Court[] of the conqueror," the Supreme Court encroached upon a primary attribute of tribal sovereignty, tribal land base, but solidified what remained—a federally protected right of occupancy.[25]

Cherokee Nation v. Georgia resembled *Marbury v. Madison*,[26] which avoided eroding the legitimacy of the Supreme Court by refusing to hear the petitioner's writ of mandamus[27] and established an enduring principle of federal Indian policy that limits tribal sovereignty—the federal trust relationship.[28] Marshall declined to hear the Cherokee Nation's bill "praying

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Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

16. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

17. PEVAR, *supra* note 12, at 12–13; *see, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area [providing a federal forum for civil actions against tribal officers] cautions that we tread lightly in the absence of clear indications of legislative intent.") (alterations in original).

18. *See* WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 72 (4th ed. 2004).

19. Droske, *supra* note 5, at 728; Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty,* COMPLEAT LAW., Fall 1995, at 14, 15.

20. 21 U.S. (8 Wheat.) 543 (1823).

21. 30 U.S. (5 Pet.) 1 (1831).

22. 31 U.S. (6 Pet.) 515 (1832).

23. *See, e.g.*, Droske, *supra* note 5, at 728; Prygoski, *supra* note 19.

24. *Johnson*, 21 U.S. at 549–50.

25. *Id*. at 588; *see, e.g.*, Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) (holding that fishing and hunting rights are inherent with a "right of occupancy" or Indian title). *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that Indian title does not create rights against taking or extinction by the United States subject to a right of compensation).

26. 5 U.S. (1 Cranch) 137 (1803).

27. *See Marbury*, 5 U.S. at 176–80; WILLIAM EDWARD NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 70 (2000).

28. *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831).

[for] an injunction restraining the state of Georgia from the execution of certain laws . . . [alleged] to annihilate the Cherokees as a political society."[29] He also rejected the argument that tribes were foreign states in the sense of the Constitution but recognized tribes as "domestic dependent nations" whose "relation to the United States [resembled] that of a ward to his guardian."[30]

Although *Cherokee Nation* denied the tribes' injunction request, it established the two sides of the "federal trust relationship" coin. On one side, Marshall held that tribes were subject to federal government authority as the "ward to his guardian."[31] On the other side, Marshall held that the federal government had a responsibility of pupilage and guardianship.[32] Thus, the federal trust relationship qualifies the federal government's authority and power over tribes.[33]

Worcester v. Georgia built upon the federal trust relationship coin that Marshall established in *Cherokee Nation* and embraced tribal sovereignty against state encroachment.[34] Here, Marshall used the federal trust relationship and an exclusive right to engage in commerce to justify federally regulated intercourse with Indian nations as "distinct political communities."[35] Marshall therefore held that "the laws of Georgia can have no force" within the Cherokee Nation.[36] In sum, *Worcester* bolstered tribal sovereignty to protect tribes from state control and solidified qualified tribal sovereignty as subject to the authority of the federal government as conqueror.[37]

In addition to "The Marshall Trilogy," two other cases have expanded upon the notion of qualified tribal sovereignty. *Lone Wolf v. Hitchcock* demonstrated the extent of Congress's power over tribes.[38] In particular, the Supreme Court held that Congress's power over tribes is plenary, subject to a presumption of good faith, and ultimately non-judiciable to the extent of preempting inquiry into fraudulent misrepresentations leading to the extinction of tribal land.[39] Additionally, *Williams v. Lee* established the "infringement test" that governed the scope of state action and interference

29. *Id*. at 15.

30. *Id*. at 17.

31. *Id*.

32. *Id*.

33. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 295 (1942) (holding that federal government breached the trust relationship by failing to prevent misappropriation of trust funds by tribal treasurer).

34. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

35. *Id*. at 556–57.

36. *Id*. at 561.

37. *Id*.

38. 187 U.S. 553, 565–68 (1903).

39. *Id*.

over tribal sovereignty.[40] Specifically, the Supreme Court characterized the "infringement test" as follows: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[41]

B. Federal and State Criminal and Civil Jurisdiction over Indian Country

1. Criminal Jurisdiction over Indian Country

Congress passed several expansive legislative acts that qualified tribal sovereignty over criminal jurisdiction in the name of tribal interest and the federal trust relationship.[42] Immediately following the Revolutionary War, Congress passed legislation to extend federal criminal jurisdiction over crimes committed in Indian country by non-Indians against Indians "as part of the overall federal policy of providing a buffer between the non-Indian and Indian populations."[43] Subsequently, Congress enacted the General Crimes Act to extend federal criminal jurisdiction to cover all crimes in Indian country except (1) crimes committed by Indians against Indians, (2) crimes committed by Indians who receive punishment by the tribe, and (3) crimes over which a treaty gives exclusive jurisdiction to the tribe.[44] Congress further qualified tribal sovereignty over criminal jurisdiction when it passed the Major Crimes Act, which expanded federal criminal jurisdiction over seven severe crimes committed by Indians against Indians. Today, the Major Crimes Act extends federal criminal jurisdiction over fourteen severe crimes.[45]

While Congress expanded federal criminal jurisdiction over Indian country, the Supreme Court eroded tribal criminal jurisdiction and held that tribes have no general criminal jurisdiction over non-Indians.[46] The Court held that "[w]hile not conclusive on the issue before us, the commonly shared

40. 358 U.S. 217, 220 (1959).

41. *Id*.

42. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2006); Indian Country Crimes Act, 18 U.S.C. § 1152 (2006).

43. CANBY, *supra* note 18, at 133 (citing 1 Stat. 138 (1790); 1 Stat. 743 (1799); 2 Stat. 139 (1802)).

44. *Id*. at 133–34; General Crimes Act, Ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152 (2006)).

45. Major Crimes Act, Pub. L. No. 94-297, § 2, 90 Stat. 585 (1976) (codified as amended at 18 U.S.C. § 1153 (2006)); *see also* PEVAR, *supra* note 12, at 78, 389 (The Major Crimes Act originally authorized the federal government to prosecute murder, manslaughter, rape, assault, assault with intent to kill, arson, burglary, and larceny. Subsequently Congress amended the Major Crimes Act to include incest, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual who has not attained the age of sixteen years, robbery, and theft among others. § 2, 90 Stat. at 585.)

46. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight."[47] Accordingly, the Court concluded that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[48]

2. Civil Jurisdiction over Indian Country

Although Congress also took numerous measures to qualify tribal sovereignty over civil jurisdiction in the name of the federal trust relationship, federal and state civil jurisdiction over Indian country seems narrower than federal criminal jurisdiction. For instance, state courts lack jurisdiction over civil claims made by non-Indians against Indians in Indian country.[49] Similarly, state courts lack civil jurisdiction between tribal members.[50] However, Indian tribes lack civil jurisdiction over nonmembers on non-Indian fee land unless (1) the nonmembers entered into a consensual relationship with the tribe or its members or (2) "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[51] Nonetheless, the Indian Commerce Clause grants the federal government plenary power over tribes, which includes the power to delegate jurisdiction to the states, as demonstrated in Public Law 280.[52]

C. Public Law 280: A Federal Grant of Criminal and Civil Jurisdiction to States

Passed in 1953 during the "Termination Period,"[53] Public Law 280 is perhaps the most expansive piece of legislation that qualifies tribal sovereignty as it pertains to criminal and civil jurisdiction over Indian

47. *Id*. at 206.

48. *Id*. at 210.

49. Williams v. Lee, 358 U.S. 217, 222 (1959).

50. Fisher v. District Court, 424 U.S. 382, 388 (1976).

51. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 (2001); Montana v. United States, 450 U.S. 544, 565–66 (1981).

52. U.S. CONST. art I., § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (2006) (criminal); 28 U.S.C. § 1360 (2000) (civil)).

53. CANBY, *supra* note 18, at 58 (During the Termination Period, Congress passed legislation that served to terminate both the special "Trust Relationship" between the federal government and the tribes as well as tribes themselves); *see also* Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. GENDER RACE & JUST. 449, 451 (2004) (Congress also passed Public Law 280 "[i]n order to relieve the strain on federal resources and better address rampant lawlessness in Indian country and inadequate tribal courts.").

country.[54] On one hand, Public Law 280 states[55] have jurisdiction to enforce their criminal laws inside and outside Indian country.[56] Specifically, Public Law 280 reads:

> Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.[57]

Consequently, neither the General Crimes Act nor the Major Crimes Act applies in Public Law 280 states.[58]

On the other hand, Public Law 280 states have civil jurisdiction inside and outside Indian country.[59] Specifically, the Public Law 280 reads:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.[60]

In *Bryan v. Itasca County*, the Supreme Court interpreted this statutory language to "authorize[] application by the state courts of their rules of decision to decide [civil] disputes"—in short, Public Law 280 delegated to states civil/adjudicatory jurisdiction over Indian country.[61] Despite Public

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54. PEVAR, *supra* note 12, at 122–23.

55. I will refer to states where Public Law 280 applies as "Public Law 280 states." I will also refer to tribes to whom Public Law 280 applies as "Public Law 280 tribes." Public Law 280 applies in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id*. The remaining forty-four states received the option of assuming criminal jurisdiction over Indian tribes. *Id*. at 156.

56. Pub. L. No. 83-280, § 2, 67 Stat. 588, 588–89.

57. § 2(a), 67 Stat. at 588.

58. § 2(c), 67 Stat. at 589.

59. § 2, 67 Stat. at 589.

60. § 4, 67 Stat. at 589.

61. Bryan v. Itasca County, 426 U.S. 373, 384 (1976). Nonetheless, Public Law 280 exempts three substantive areas from state criminal or civil jurisdiction: (1) "the state may not tax, encumber, or alienate Indian trust property," (2) "[the state] may not regulate the use of Indian trust property in

Law 280, tribes may also exercise civil jurisdiction within Indian country if they exercise it in compliance with pertinent federal Indian law.[62] Taken together, Public Law 280 confers two types of jurisdiction to states over Indian country—criminal/prohibitory and civil/adjudicatory.[63] By contrast, Public Law 280 did not confer civil/regulatory jurisdiction.[64]

Unfortunately, whether a Public Law 280 state law applies in Indian country seems anything but clear-cut, for the courts have struggled to distinguish between criminal/prohibitory and civil/regulatory laws.[65] *California v. Cabazon Band of Mission Indians* explained the distinction as follows:

> [I]f the intent of a state law is generally to *prohibit* certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to *regulation*, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.[66]

Critics argue that the *Cabazon* test seems ambiguous and subject to manipulation because the Court neglects to define the "conduct at issue."[67] Additionally, the test seems amorphous because courts consider public policy to construe state legislation that is neither a clear-cut criminal nor civil law.[68] Unsurprisingly, state courts that have applied the *Cabazon* test have reached inconsistent results for nearly identical statutes that pertain to traffic laws, family laws, and fireworks laws.[69]

Courts in Public Law 280 states have reached differing results where they construe state driving laws because the states regulate some aspects of driving

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any manner that conflicts with federal law," and (3) "the state may not deprive an Indian or tribe of federally guaranteed hunting, fishing, or trapping rights and the right to license, control, and regulate the same." PEVAR, *supra* note 12, at 156.

62. Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559–62 (9th Cir. 1991); Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 2000 WI 79, ¶ 32, 236 Wis. 2d 384, ¶ 32, 612 N.W.2d 709, ¶ 32.

63. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

64. *Id*.

65. Timothy J. Droske, Comment, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U.L. REV. 897, 904–05, n.54 (2007).

66. 480 U.S. at 209 (emphasis added).

67. Droske, *New Battleground*, *supra* note 65, at 904–05 n.54 (citing State v. Stone, 572 N.W.2d 725, 729 (Minn. 1997)).

68. Garrison, *supra* note 53, at 459.

69. *Id*. at 459–68.

itself, such as licensing and other automobile requirements, while prohibiting others, such as dangerous driving.[70] On one hand, the Minnesota Court of Appeals has held that "Minnesota does not prohibit driving, but instead generally permits the larger activity of driving, subject to regulatory limitations."[71] Similarly, the Ninth Circuit Court of Appeals has held that because Washington amended its traffic code to decriminalize certain traffic offenses, provisions applying to speeding constituted a civil/regulatory law not enforceable within Indian country.[72]

On the other hand, the Seventh Circuit Court of Appeals has held that Wisconsin's motor vehicle licensing statute served to deter dangerous driving and constituted a criminal/prohibitory law.[73] Likewise, the Idaho Supreme Court has held that traffic offenses constituted criminal/prohibitory law; in doing so, the court focused primarily on the definition of traffic laws as criminal in the state constitution and prior case law that deemed them criminal.[74] Nonetheless, most Public Law 280 courts have held that state laws that serve to deter driving while intoxicated constitute criminal/prohibitory laws within the states' Public Law 280 jurisdiction.[75]

Similar to state driving laws, courts in Public Law 280 states have reached differing results where they must construe family law because these laws address both the need to protect children as well as the need to regulate child custody agreements.[76] For example, state courts have reached differing results where they confront challenges to statutes that address felony injury to a child.[77] On one hand, the Idaho Court of Appeals has held that although a statute was added to the civil/regulatory laws that protect children, such as Idaho's Child Protective Act or Parent-Child Relationship Termination Act, such a statute constituted a criminal/prohibitory law because it prohibits injury to children.[78] On the other hand, the Northern District Court of California has held that the state's child welfare statutes constitute civil/regulatory law because they generally permit the conduct of parenting.[79] Further yet, the

70. *Id*. at 459–65; *see also* Arthur F. Foerster, Comment, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1344–46 (1999).

71. Garrison, *supra* note 53, at 460 (discussing *Stone*, 557 N.W.2d at 591).

72. *Id*. at 460–61 (discussing Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 148–49 (9th Cir. 1991)).

73. *Id*. at 461 (discussing St. Germaine v. Cir. Ct. for Vilas County, 938 F.2d 75, 77 (7th Cir. 1991)).

74. *Id*. at 462 (discussing State v. George, 905 P.2d 626, 631 (Idaho 1995)).

75. *Id*. at 463–64 (discussing Bray v. Comm'r of Public Safety, 555 N.W.2d 757, 761 (Minn. Ct. App. 1996); State v. McCormack, 793 P.2d 682, 686 (Idaho 1990)).

76. *Id*. at 465–67.

77. *Id*. at 465.

78. *Id*. at 465–66 (discussing State v. Marek, 777 P.2d 1253, 1255 (Idaho Ct. App. 1989)).

79. *Id*. at 466–67 (discussing Doe v. Mann, 285 F. Supp. 2d 1229, 1237 (N.D. Cal. 2003)).

district court departed from the *Cabazon* test because it believed that tribal courts did not have adequate resources to assume jurisdiction over Indian child welfare matters.[80]

Courts in Public Law 280 states have similarly construed statutes that confront fireworks sales and use as criminal/prohibitory in some states and civil/regulatory in other states.[81] On one hand, the Ninth Circuit Court of Appeals has held that a California fireworks statute constituted a criminal/prohibitory law despite the fact that the California Health and Safety Code described the statute as regulatory and the fact that the statutory scheme established permits and licensing fees.[82] On the other hand, a Wisconsin court of appeals embraced the argument that because the Wisconsin legislature titled the statute that confronted fireworks sales and use as "Regulation of Fireworks" and established permits and exceptions, the statute was a civil/regulatory law.[83] The Wisconsin court rejected the state's argument that the legislature passed the statute to prevent costly forest fire because "[t]he sale of fireworks, for good or bad, does not violate this State's public policy."[84] Taken together, these cases show that courts may easily manipulate the *Cabazon* test because the guiding signpost, whether the conduct at issue violates state public policy, provides inconsistent results.[85]

Although few courts have considered whether sex offender registration and notification laws are criminal/prohibitory or civil/regulatory, the Wisconsin and Minnesota state supreme courts have agreed that sex offender laws are probably criminal/prohibitory laws.[86] The Wisconsin Supreme Court has held that a law providing for civil commitment of sexually violent persons was a criminal/prohibitory law where Wisconsin prohibited the conduct "at the heart" of the law—sex offenses.[87] Similarly, the Minnesota Supreme Court has held that Minnesota unequivocally prohibited "the narrow conduct of a predatory offender residing or moving without maintaining a current

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80. *Id*.

81. *Id*. at 467–68.

82. *Id*. at 467 (discussing Quechan Indian Tribes v. McMullen, 984 F.2d 304, 307 (9th Cir. 1993)).

83. *Id*. at 467–68 (discussing State v. Cutler, No. 94-1464, 1994 WL 656820, at *3 (Wis. Ct. App. Nov. 22, 1994)).

84. *Id*.

85. Garrison, *supra* note 53, at 468–69.

86. *See* State v. Jones, 729 N.W.2d 1, 7–8 (Minn. 2007); *In re* Commitment of Burgess, 2003 WI 71, ¶ 19, 262 Wis. 2d 354, ¶ 19, 665 N.W.2d 124, ¶ 19.

87. *Burgess*, 2003 WI 71, at ¶ 19, 262 Wis. 2d at ¶ 19, 665 N.W.2d at ¶ 19. The court also noted that the civil commitment laws would also constitute civil/adjudicatory laws because they "'have to do with private rights and status' [such as an] adjudication of . . . mental health." *Id*. at ¶¶ 20–21 (quoting Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. REV. 267, 296 (1973)).

address registration with the appropriate authorities."[88] The Minnesota Supreme Court therefore held that the state requirement that sex offenders maintain a current address registration fell within the criminal/prohibitory jurisdiction conferred by Public Law 280.[89]

III. TRIBES' CONCERNS WITH SECTION 127 OF THE AWA

Part III examines tribes' argument that the AWA encroaches upon the current federal Indian law policy of promoting tribal sovereignty. Tribes argue that section 127 of the AWA encroaches upon the existing federal Indian law policy of tribal sovereignty in both non-Public Law 280 and Public Law 280 states.[90] In other words, as the National Conference of American Indians ("NCAI") and its brethren have noted, section 127 is "an expansion of state jurisdiction that will unnecessarily complicate the already confusing system of criminal jurisdiction on tribal lands."[91] Although Congress has plenary power to enact legislation such as the AWA and delegate authority to the states,[92] the tribes' challenge that the AWA departs from current federal Indian law and policy favoring tribal sovereignty is significant because federal Indian law and policy has historically shifted as a "pendulum" between overregulation in the name of the federal trust relationship and promoting tribal sovereignty.[93] Consequently, any departure from current federal Indian policy may indicate an unwanted shift in federal Indian law and policy away from tribal sovereignty and toward assimilation or oppression.[94]

Subpart A suggests that the AWA threatens tribal sovereignty in non-Public Law 280 states because the AWA may retrocede sex offender registration and notification responsibilities to the state, where non-Public Law 280 tribes fail to comply with the AWA's requirements. Subpart B recognizes, however, that section 127 does not extend beyond the scope of criminal/prohibitory and civil/adjudicatory jurisdiction delegated to states

88. *Jones*, 729 N.W.2d at 7–8.

89. *Id*. at 8.

90. *See* NCAI Resolution, *supra* note 7. Additionally tribes have urged that the AWA departed from the federal Indian policy of "self-determination" because it does not allow tribes to assume responsibility for sex offender registration as they develop the capacity and resources to do so. Nat'l Cong. of Am. Indians, *Urgent Action Needed: One Month Until the Adam Walsh Act Deadline!* (2007), *available at* http://ncai.org/fileadmin/governance/07_036_AdamWalshAct_1_.pdf.

91. NCAI Resolution, *supra* note 7.

92. *See* U.S. CONST. art I, § 8, cl. 3. ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–68 (1903).

93. *See* EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 11–12 (1989)); PEVAR, *supra* note 12, at 4 (citing ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW, at vi–vii (3d ed. 1991)).

94. *See* PEVAR, *supra* note 12, at 13–14.

over Public Law 280 tribes, where courts construe the AWA registration provisions as a criminal/prohibitory law. Nonetheless, subpart B suggests that the federal district courts' response to Ex Post Facto Clause challenges to the AWA, finding the AWA registration provisions a civil law, does support Public Law 280 tribes' argument that section 127 extends beyond the scope of jurisdiction delegated to states under Public Law 280.

A. Non-Public Law 280 Tribes' Challenge to Section 127 of the AWA

Non-Public Law 280 tribes challenge that section 127 of the AWA threatens to encroach upon existing tribal sovereignty where it requires tribes to retrocede its sex offender registration and notification responsibilities where tribes fail to implement them.[95] At the outset, section 127 allows non-Public Law 280 tribes to elect to carry out sex offender registration and notification functions.[96] However, section 127 delegates to the Attorney General the authority to retrocede these functions to the state in which the tribe resides, where a non-Public Law 280 tribe cannot "substantially implement" the requirements after electing to do so.[97] Nonetheless, section 127 permits a non-Public Law 280 tribe to delegate its responsibilities to another jurisdiction in which the tribe is located where it believes it cannot carry out the registration and notification responsibilities.[98]

Digging deeper, non-Public Law 280 tribes' challenge to section 127 seems even more persuasive because non-Public Law 280 tribes appear unable to finance independent registration and notification programs.[99] The AWA allocates funds for registration and notification programs on the basis of performance and compliance—awarding supplemental funds for compliance and reductions for failure.[100] The AWA therefore disparately impacts tribes unable to comply solely upon their own funds because tribal

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95. Deer, *supra* note 9. The AWA created the "SMART Office," which "administers the national standards for sex offender registration and assists the states with questions throughout the implementation process." Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L. J. 471, 483 n.102 (2008); *see also* The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,211 (May 30, 2007) (proposed guidelines).

96. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 127(a), 120 Stat. 587, 599–600 (to be codified at 42 U.S.C. § 16927(a)).

97. *Id*. § 127(a)(2)(C).

98. *Id*. § 127(a)(1)(B).

99. *See* NCAI Resolution, *supra* note 7; Deer, *supra* note 9; Jerry Reynolds, *Sovereignty Issues Plague Adam Walsh Act*, INDIAN COUNTRY TODAY, Apr. 2, 2008, at A3; Jodi Rave, *Tribal Leaders Testify to Congress on Mandate to Register Sex Offenders*, THE MISSOULIAN, July 18, 2008, *available at* http://www.missoulian.com/articles/2008/07/18/jodirave/rave46.prt; John Gramlich, *States to Enforce Molester Law on Tribal Land*, May 15, 2008, http://www.stateline.org/live/details/story?contentId=309820.

100. § 125(b)(4), 120 Stat at 587, 599 (to be codified at 42 U.S.C. § 16925(b)(4)).

justice systems have long suffered from inadequate funding.[101] Additionally, many tribes have not previously participated in sex offender registration and notification programs, so non-Public Law 280 tribes may require more resources and technical support as compared to states.[102] Non-Public Law 280 tribes also seem "ill-prepared to compete with more sophisticated applicants in a competitive grant process."[103] In sum, historically inadequate tribal justice system funding, inexperience, and steep competition for federal funding renders the AWA a potential encroachment upon tribal sovereignty in non-Public Law 280 states.[104]

B. Public Law 280 Tribes' Challenge to Section 127 of the AWA

Public Law 280 tribes challenge that section 127 of the AWA extends jurisdiction to states beyond the Public Law 280 delegation of criminal/prohibitory and civil/adjudicatory jurisdiction. Applying the Public Law 280 jurisprudence laid forth by the Wisconsin and Minnesota supreme courts, which construes sex offender legislation as a criminal/prohibitory law, section 127 does not extend beyond the scope of criminal/prohibitory and civil/adjudicatory jurisdiction delegated to states under Public Law 280. Nonetheless, the federal district courts' response to Ex Post Facto Clause challenges to the AWA, finding the AWA registration provisions a civil law, does support Public Law 280 tribes' argument that section 127 extends beyond the scope of jurisdiction delegated to states under Public Law 280.

1. Applying Public Law 280 Jurisprudence to the AWA Registration Provisions

Public Law 280 tribes challenge that section 127 of the AWA threatens to encroach upon tribal sovereignty because it automatically delegates to states the authority to carry out sex offender registration and notification functions

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101. Maria Odum, *Money Shortage Seen as Hindering Indian Justice*, N.Y. TIMES, Oct. 4, 1991, at B.16.
Odum writes:

> The disparities between most courts in the country and Indian tribal courts have long been conceded, but there is increasing concern among American Indians, civil rights officials and some members of Congress that these disparities, caused in large part by inadequate financial support, are depriving litigants in the tribal system of their civil rights.

Id.

102. Letter from Joe Garcia, NCAI President, to Laura Rogers, Director of SMART Office, U.S. Dept. of Justice (June 1, 2007), *available at* http://www.ncai.org/ncai/resource/documents/governance/Adam_Walsh_Act/grant_letter.pdf.

103. *Id*.

104. NCAI Resolution, *supra* note 7.

for Public Law 280 tribes.[105] Section 127 does not permit Public Law 280 tribes to "elect" to carry out registration and notification functions.[106] Instead, section 127 treats Public Law 280 tribes as if they

> [E]lect[ed] to delegate [their] functions under this subtitle to another jurisdiction or jurisdictions within which the territory of the tribe is located and to provide access to its territory and such other cooperation and assistance as may be needed to enable such other jurisdiction or jurisdictions to carry out and enforce the requirements of this subtitle.[107]

Public Law 280 tribes' challenge to section 127 depends on whether the AWA registration and notification laws constitute civil/regulatory or criminal/prohibitory laws.[108] However, based on the two Wisconsin and Minnesota supreme court decisions addressing sex offender registration laws as applied within Indian country,[109] section 127 seems to extend state criminal/prohibitory jurisdiction over tribes consistent with Public Law 280.[110] More specifically, because federal law prohibits the type of sexual conduct at the heart of the AWA, the AWA would appear criminal/prohibitory under Wisconsin law.[111] Similarly, because the federal law prohibits "the narrow conduct of a predatory offender residing or moving without maintaining a current address registration with the appropriate authorities," the AWA appears criminal/prohibitory under Minnesota law.[112]

Additionally, section 127 of the AWA perhaps allows Public Law 280 tribes and states to establish cooperative agreements to carry out the registration and notification functions, and this provision defends, albeit to a limited extent, against critics' claims that the Act encroaches upon tribal sovereignty.[113] In particular, cooperative agreements seem consistent with the

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105. *Id*.; Deer, *supra* note 9; Rave, *supra* note 99; Reynolds, *supra* note 99.

106. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 127(a)(2)(A), 120 Stat. 587, 600 (2006) (to be codified at 42 U.S.C. § 16927(a)(2)(A)).

107. § 127(a)(1)(B), 120 Stat. at 600.

108. *See supra* text accompanying notes 53–64.

109. State v. Jones, 729 N.W.2d 1, 7–8 (Minn. 2007); *In re* Commitment of Burgess, 2003 WI 71, ¶ 19, 262 Wis. 2d 354, ¶ 19, 665 N.W.2d 124, ¶ 19.

110. *See supra* text accompanying notes 65–89.

111. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006) (to be codified at 42 U.S.C. § 16901); *Burgess*, 2003 WI 71, ¶ 19, 262 Wis. 2d 354, ¶ 19, 665 N.W.2d 124, ¶ 19 . Nonetheless, I dismiss arguments that the AWA would constitute a civil/adjudicatory law because, unlike civil commitment proceedings, sex offender registration laws seem more akin to taxing and franchising than to "private rights and status." *Burgess*, 2003 WI 71, ¶ 20, 262 Wis. 2d 354, ¶ 20, 665 N.W.2d 124, ¶ 20 (citing Israel & Smithson, *supra* note 87, at 296).

112. *Jones*, 729 N.W.2d at 7–8.

113. Section 127(b)(2) states that:

widely shared belief that Public Law 280 did not deprive Public Law 280 tribes and their courts of concurrent jurisdiction over civil matters.[114] Nonetheless, section 127, as written, does not require Public Law 280 states to enter into cooperative agreements with tribes.[115]

2. Applying Ex Post Facto Clause Doctrine to the AWA Registration Provisions

a. Ex Post Facto Clause Doctrine

Article I, Section 9, clause 3 of the United States Constitution states, "No Bill of Attainder or ex post facto Law shall be passed."[116] Primarily, the Ex Post Facto Clause prohibits Congress and the states from passing any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[117] Legislation violates the Ex Post Facto Clause where two elements are present: (1) the legislation must apply retroactively, and (2) the legislation must disadvantage the retrospective offender.[118] In other words, "if a statute merely alters penal provisions . . . it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."[119]

Courts that apply the Ex Post Facto Clause doctrine should determine whether the legislature, by passing a statute, intended to establish "'civil' proceedings."[120] Legislative intent to impose punishment after the fact is a

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> A tribe may, through cooperative agreements with such a jurisdiction or jurisdictions—
>
> (A) arrange for the tribe to carry out any function of such a jurisdiction under this subtitle with respect to sex offenders subject to the tribe's jurisdiction; and
>
> (B) arrange for such a jurisdiction to carry out any function of the tribe under this subtitle with respect to sex offenders subject to the tribe's jurisdiction.

120 Stat. at 600.

114. Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559–62 (9th Cir. 1991); Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 2000 WI 79, ¶ 32, 236 Wis. 2d 384, ¶ 32 , 612 N.W.2d 709, ¶ 32.

115. § 127(b)(2), 120 Stat. at 600.

116. U.S. CONST. art I, § 9, cl. 3.

117. Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325–26 (1867)).

118. *Weaver*, 450 U.S. at 29–30.

119. *Id*. at 30–31.

120. Kansas v. Hendricks, 521 U.S. 346, 361 (1997). The Supreme Court seems to characterize civil and criminal "proceedings" more generally than state courts that decide Public Law

prima facie Ex Post Facto Clause violation.[121] By contrast, if the legislature intended to impose a civil and nonpunitive regulatory scheme, then a statute constitutes an Ex Post Facto Clause violation where it is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[122] Courts consider seven factors to analyze the effects of a law:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.[123]

Courts must defer to legislative intent, and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[124] Ultimately, the Ex Post Facto Clause doctrine analysis is an exercise in statutory construction or interpretation.[125]

Recently, the United States Supreme Court applied the Ex Post Facto Clause doctrine to Alaska's state sex offender registration laws and determined that the registration laws did not violate the Ex Post Facto Clause.[126] To begin, the Court determined that the Alaska legislature intended the sex offender registration laws to impose a civil, nonpunitive regulatory scheme.[127] Subsequently, the Court determined that Alaska's civil and nonpunitive sex offender registration laws were not "so punitive" in either purpose or effect to negate Alaska's legislative intent.[128]

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280 jurisdictional disputes. Therefore, the Court's use of the term "proceedings" does not seem to overlap with Public Law 280's delegation of civil/adjudicatory jurisdiction. *Id*.; *see also In re* Commitment of Burgess, 2003 WI 71, ¶¶ 20–21, 262 Wis. 2d 354, ¶¶ 20–21, 665 N.W.2d 124, ¶¶ 20–21 (explaining civil/adjudicatory proceedings).

121. *Hendricks*, 521 U.S. at 361.

122. *Id*. (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)).

123. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (emphasis omitted).

124. Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

125. *Smith*, 538 U.S. at 92 (citing *Hendricks*, 521 U.S. at 361).

126. *Id*. at 84, 106.

127. *Id*. at 96.

128. *Id*. at 97–106.

b. The AWA Sex Offender Registration Provisions

The AWA, through the Sex Offender Registration and Notification Act (SORNA) provisions, requires sex offenders to register and notify local authorities where the sex offender moves interstate into another community.[129] Specifically, the AWA requires "a sex offender [to] register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."[130] Additionally, the AWA increases the punishment to up to ten years imprisonment for sex offenders who (1) are required to register, (2) travel in interstate commerce, and (3) knowingly fail to register or update registration.[131] Finally, the AWA delegates the Attorney General authority:

> [T]o specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) [Initial registration].[132]

Criminal defendants have challenged that applying the AWA retrospectively for failing to register as a sex offender between July 27, 2006, when Congress passed the AWA, and February 28, 2007, when the Attorney General declared that the AWA applied retroactively to sex offenders convicted before its enactment, is an Ex Post Facto Clause violation.[133]

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129. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 112–113, 120 Stat. 587, 593–94 (2006) (to be codified at 42 U.S.C. §§ 16912–13).

130. *Id*.

131. *Id*. at ch. 109B, sec. 2250, § 141, 120 Stat. at 601–02 (to be codified as amended at 18 U.S.C. § 2250).

132. *Id*. § 113(d). The Attorney General exercised his authority to apply the AWA retrospectively on February 28, 2007. Sex Offender Registration and Notification, 28 C.F.R. § 72.3 (2007).

133. *See* United States v. Natividad-Garcia, 560 F. Supp. 2d 561 (W.D. Tex. 2008); United States v. Gillette, 553 F. Supp. 2d 524 (D. Virgin Islands 2008); United States v. Ditomasso, 552 F. Supp. 2d 233 (D.R.I. 2008); United States v. Madera, 474 F. Supp. 2d 1257 (M.D. Fla. 2007) *overruled, in part, by* United States v. Madera 528 F.3d 852, 859 (11th Cir. 2008); United States v. Gill, 520 F. Supp. 2d 1341 (D. Utah 2007); United States v. Stinson, 507 F. Supp. 2d 560 (S.D. W. Va. 2007); United States v. Hinen, 487 F. Supp. 2d 747 (W.D. Va. 2007); United States v. Akers, No. 3:07-CR-00086(01) RM, 2008 WL 914493 (N.D. Ind. Apr. 3, 2008); United States v. Dixon, No. 3:07-CR-72(01) RM 2007, WL 4553720 (N.D. Ind. Dec. 18, 2007); United States v. Elliott, No. 07-14059-CR, 2007 WL 4365599 (S.D. Fla. Dec. 13, 2007); United States v. Adkins, No. 1:07-CR-59, 2007 WL 4335457 (N.D. Ind. Dec. 7, 2007); United States v. Cardenas, No. 07-80108-CR, 2007 WL 4245913 (S.D. Fla. Nov. 29, 2007); United States v. Howell, No. CR07-2013-MWB, 2007 WL 3302547 (N.D. Iowa Nov. 8, 2007); United States v. Beasley, No. 1:07-CR-115-TCB, 2007 WL

Although one federal appellate court has attempted to provide guidance,[134] federal district courts have responded to Ex Post Facto Clause challenges in two ways. First, federal district courts have focused on the section 2250 provision that increased punishment for failing to register, distinguished these provisions from the Alaska registration laws in *Smith*, and held that the AWA provision violates the Ex Post Facto Clause.[135] Second, federal district courts have focused on the section 16912 registration provision, recognized that these provisions compare to the Alaska registration laws, and held that the AWA does not violate the Ex Post Facto Clause.[136]

c. Reconsidering Public Law 280 Tribes' Challenge

The federal district courts' response to Ex Post Facto Clause challenges to the AWA, finding the AWA registration provisions a civil law, supports Public Law 280 tribes' argument that section 127 extends beyond the scope of jurisdiction delegated to states under Public Law 280. Although the Wisconsin and Minnesota supreme courts have interpreted sex offender registration laws as criminal/prohibitory law under Public Law 280 jurisprudence,[137] the Supreme Court and federal district courts have interpreted the AWA sex offender registration laws as civil law under Ex Post Facto Clause doctrine.[138] In other words, courts have interpreted the AWA registration provisions differently under Public Law 280 jurisprudence than Ex Post Facto Clause doctrine.

Nonetheless, the *Cabazon* test and subsequent Public Law 280 jurisprudence seems less reliable than the Ex Post Facto Clause doctrine. In particular, the "Seven Factor Analysis" seems to parse out the distinction

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3489999 (N.D. Ga. Oct. 10, 2007); United States v. Deese, No. CR-07-167-L, 2007 WL 2778362 (W.D. Okla. Sept. 21, 2007); United States v. Muzio, No. 4:07CR179 CDP, 2007 WL 2159462 (E.D. Mo. July 26, 2007); United States v. Templeton, No. Cr-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007).

134. *Madera*, 528 F.3d at 859 (holding that the AWA does not apply to defendants who became sex offenders prior to July 27, 2006, and failed to register prior to February 28, 2007). However, the Eleventh Circuit passed on Madera's general Ex Post Facto Clause challenge. *Id*.

135. *See generally Natividad-Garcia*, 560 F. Supp. 2d 561; *Gillette*, 553 F. Supp. 2d 524; *Gill*, 520 F. Supp. 2d 1341; *Stinson*, 507 F. Supp. 2d 560; *Howell*, 2007 WL 3302547; *Beasley*, 2007 WL 3489999; *Deese*, 2007 WL 2778362; *Muzio*, 2007 WL 2159462.

136. *See generally Ditomasso*, 552 F. Supp. 2d 223; *Akers*, 2008 WL 914493; *Madera*, 474 F. Supp. 2d 1257; *Hinen*, 487 F. Supp. 2d 747; *Dixon*, 2007 WL 4553720; *Elliott*, 2007 WL 4365599; *Adkins*, 2007 WL 4335457; *Cardenas*, 2007 WL 4245913; *Templeton*, 2007 WL 445481.

137. Again, I dismiss arguments that the AWA would constitute a civil/adjudicatory law because, unlike civil commitment proceedings, sex offender registration laws seem more akin to taxing and franchising than to "private rights and status" such as an "adjudication of . . . mental health." *In re* Commitment of Burgess, 2003 WI 71, ¶¶ 20–21, 262 Wis. 2d 354, ¶¶ 20–21, 665 N.W.2d 124, ¶¶ 20–21 (2003) (citing Israel & Smithson, *supra* note 87, at 296).

138. *See supra* text accompanying notes 116–36.

between criminal/prohibitory and civil/regulatory laws.[139] Although the "Seven Factor Analysis" focuses on whether a law imposes ex post facto punishment, four of the factors could implicitly examine whether a state law is criminal/prohibitory or civil/regulatory: (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, and (5) whether the behavior to which it applies is already a crime.[140] These relevant factors, as well as the well-developed area of statutory construction and interpretation applied in *Smith*, also seem more concrete than the vague "conduct at issue" inquiry established in *Cabazon*.[141] Consequently, although the Ex Post Facto Clause has no legal connection to Public Law 280 jurisprudence,[142] the federal courts have provided implicit support to reconsider Public Law 280 tribes' argument that the AWA registration and notification laws encroach upon tribal sovereignty by unilaterally delegating a civil/regulatory responsibility to Public Law 280 states.

IV. AMENDING SECTION 127 OF THE AWA TO RESIST ENCROACHING UPON TRIBAL SOVEREIGNTY

Part IV proposes that because the AWA threatens the tribal sovereignty of both non-Public Law 280 and Public Law 280 tribes, Congress should amend section 127 of the AWA to require tribe and state cooperative agreements to carry out the sex offender registration and notification functions. Subpart A recognizes that Congress has previously enacted legislation that requires tribes and states to enter into cooperative agreements to regulate activity in Indian country—the IGRA. Despite confronting similar objections to amending section 127, Congress again should resolve tribe and state jurisdictional conflict with legislation requiring cooperation between tribes and states to carry out sex offender registration and notification.

Subpart B suggests that amending section 127 to require tribe and state cooperative agreements would promote effective sex offender registration programs tailored to fit the needs of each tribe. Subpart C similarly suggests that amending section 127 to require tribe and state cooperative agreements

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139. *Supra* text accompanying notes 116–36

140. *See supra* text accompanying note 123 for the "Seven Factor Analysis."

141. *Compare* Smith v. Doe, 538 U.S. 84, 92–106 (2003) *with* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987); *see also supra* text accompanying notes 65–85 (discussing the ambivalence of the *Cabazon* test to address various state laws).

142. Nonetheless, courts should continuously strive for consistency in law. *See* Payne v. Tennessee, 501 U.S. 808, 849 (1991) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), and noting that courts may depart from precedent where it becomes a "detriment to coherence and consistency in the law").

would promote current federal Indian law and policy favoring tribal sovereignty.

A. Following the Footsteps of the Indian Gaming Regulatory Act

Congress has previously required tribes and states to adopt cooperative agreements where courts have held that states may not regulate certain conduct within Indian country—gaming.[143] In *Seminole Tribe of Florida v. Butterworth*, the Fifth Circuit first identified that gaming was a Public Law 280 jurisdictional conflict and held that a state could interfere with tribal gaming where the state generally prohibited gaming rather than merely regulated it.[144] States responded to gaming profits throughout the 1980s with resentment,[145] and the United States Supreme Court finally confronted gaming under Public Law 280 in *California v. Cabazon Band of Mission Indians*.[146] Nonetheless, the Court relied upon the criminal/prohibitory versus civil/regulatory dichotomy and held that California could not enforce local ordinances against the tribe's gaming operations.[147]

Congress responded to the *Cabazon* decision by passing the Indian Gaming Regulatory Act,[148] which requires states and tribes to enter into gaming compacts where the tribe seeks to conduct certain gaming.[149] The IGRA expressly states the following findings in support of federal regulation of Indian gaming:

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143. *See* PEVAR, *supra* note 12, at 320.

144. 658 F.2d 310, 313 (5th Cir. 1981). "Other federal courts followed the Fifth Circuit's lead on this issue and analyzed attempted state interference with Indian bingo under the regulation/prohibition dichotomy." Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act*: *Could Two Wrongs Ever Be Made into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1339 (2000) (citing Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 712 (W.D. Wis. 1981)).

145. Twetten, *supra* note 144, at 1340; *see also* 131 CONG. REC. S4124 (daily ed. Apr. 4, 1985) (statement of Rep. DeConcini); 131 CONG. REC. E2004 (daily ed. May 8, 1985) (statement of Rep. Shumway); 131 CONG. REC. S4124 (daily ed. Apr. 4, 1985) (statement of Rep. DeConcini); 131 CONG. REC. E3060-61 (daily ed. June 27, 1985) (statement of Rep. Shumway).

146. 480 U.S. 202 (1987).

147. *Id*. at 211, 214.

148. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 (2000)).

149. *See* 18 U.S.C. § 1166; 25 U.S.C. § 2710 et seq; PEVAR, *supra* note 12, at 320; *see also* Twetten, *supra* note 144, at 1340 ("*Cabazon* capped a decade of significant victories in federal court for Indians hoping to catch the gaming gravy train. Congress took control of that train, however, in the year following *Cabazon* when it passed the Indian Gaming Regulatory Act."); 133 CONG. REC. S15802-03 (daily ed. Nov. 4, 1987) (statement of Rep. Hecht) (recognizing that Congress responded to the Cabazon decision by introducing the IGRA).

> (1) [N]umerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
>
> (2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
>
> (3) [E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) [A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.[150]

In short, Congress stepped in post-*Cabazon* to resolve the Public Law 280 jurisdictional conflict between states and tribes over gaming regulation.

Accordingly, Congress should again opt to require cooperative agreements and therefore resolve the jurisdictional tension between states and tribes over sex offender registration and notification responsibilities in favor of tribal sovereignty. Congress should find that numerous Public Law 280 Indian tribes have become engaged in or have sex offender registration and notification.[151] Congress should also find that the AWA does not provide clear or effective standards or regulations for delegating sex offender registration and notification responsibilities between non-Public Law 280 and Public Law 280 tribes and states.[152] Congress should find that a principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government, and tribes may have financial difficulty implementing sex offender registration and notification systems.[153] Finally, Congress should find that Indian tribes may have the right to regulate sex offender registration and notification on Indian lands where sex offender registration is a civil/regulatory law.[154]

Both tribes and states may resist amending the AWA to require cooperative agreements for similar reasons as the tribes and states that resisted

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150. § 2, 102 Stat. at 2467.

151. *See, e.g.*, Droske, *New Battleground*, *supra* note 65, at 913–28.

152. *See supra* text accompanying notes 90–104.

153. *See supra* text accompanying notes 99–104.

154. *See supra* text accompanying notes 105–42.

IGRA. First, Public Law 280 states may argue that Public Law 280 jurisprudence delegates AWA registration and notification functions to the state as criminal prohibitory laws.[155] Conversely, both non-Public Law 280 and Public Law 280 tribes may argue that the AWA would encroach upon tribal sovereignty by requiring tribes to enter into cooperative agreements, rather than recognizing a tribe's right to carry out the AWA registration and notification responsibilities independently.[156] Both these arguments, however, seem unpersuasive because of the demonstrated value of cooperative agreements between Public Law 280 tribes and states to carry out sex offender registration and notification functions.[157]

Second, the U.S. Justice Department "SMART" office[158] may argue that allowing Public Law 280 tribes and states to establish cooperative agreements to carry out registration and notification functions would create an enormous amount of varied systems and make monitoring and enforcing the AWA standards impossible.[159] This argument also seems unpersuasive because the AWA permits states, territories, and non-Public Law 280 tribes to establish varied systems that comply with the Attorney General's guidelines.[160]

Despite resistance from tribes, states, and the United States Justice Department, Congress should follow the footsteps of the IGRA and consider amending section 127 of the AWA to (1) strike provisions that unilaterally delegate sex offender registration and notification responsibilities to the states and (2) require that both non-Public law 280 and Public Law 280 tribes and states adopt cooperative agreements to establish sex offender registration and notification programs that comply with the AWA. To enforce section 127, Congress could also amend section 125,[161] which enables the SMART office to allocate funds for registration and notification programs on the basis of

155. One argument against passing the IGRA was that the states were appealing the *Cabazon* decision to the United States Supreme Court and the IGRA seemed inconsistent with the state's position on Public Law 280 jurisprudence. *See* 132 CONG. REC. 1421 (daily ed. Apr. 29, 1986) (statement of Rep. Shumway). Here, states would rely on the Wisconsin and Minnesota supreme court decisions construing sex offender legislation as criminal/prohibitory laws. *See supra* text accompanying notes 86–89.

156. One argument against passing the IGRA was that it would limit tribes' inherent right to regulate gaming free of state interference. *See* 131 CONG. REC. E1315 (daily ed. Apr. 3, 1985) (statement of Rep. Udall) (recognizing tribe's inherent right to regulate gaming free of state interference).

157. *See infra* text accompanying notes 162–76.

158. *See supra* note 95.

159. One argument against passing the IGRA was that it "could result in 50 different sets of regulations, which would be impossible to monitor or enforce." 132 CONG. REC. E1086-87 (daily ed. Apr. 10, 1986) (statement of Rep. Vucanovich).

160. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 112, 120 Stat. 587, 593 (2006) (to be codified at 42 U.S.C. § 16912).

161. *Id*. § 125, 120 Stat. at 599 (to be codified at 42 U.S.C. § 16925).

performance and compliance, to allocate funding for tribes and states that enter into cooperative agreements and establish sex offender registration and notification systems that comply with the AWA.

B. Establishing Custom-Fit Sex Offender Registration and Notification Programs that Comply with the AWA

Amending section 127 would encourage tribes and states to develop "custom-fit" sex offender registration and notification programs that comply with AWA. From the outset, "scholars and commentators have touted the value of tribal-state compacts over rigid divisions between tribal and State sovereignty."[162] Specifically, tribe and state cooperative agreements have immense value when dealing with sex offender registration and notification duties for two primary reasons: (1) states and tribes have the common goal of providing protection from sex offenders, and (2) no "one-size-fits-all" solution exists.[163] The first reason seems self-explanatory—because both tribes and states have a common interest in protecting the public from sex offenders, tribes and states should combine efforts to establish sex offender registration programs.[164] The second reason seems more complex yet equally persuasive; in particular, cooperative agreements allow states and tribes to accommodate for variables such as size, location, wealth, and interaction with local enforcement agencies, as well as culture and philosophy.[165]

The experience of Minnesota provides a recent example of the benefit of tribe and state cooperative agreements to establish sex offender registration programs.[166] Minnesota entered into a range of cooperative agreements with tribes to fill the gap left by *State v. Jones*, which initially declared Minnesota's sex offender registration and notification laws did not apply in Indian country because they were civil/regulatory laws.[167] On one hand, Minnesota established a cooperative agreement with the White Earth Nation and allowed the tribe to exercise maximum tribal sovereignty by regulating and enforcing its own registration and notification code with tribal police and courts.[168] On the other hand, Minnesota established a cooperative agreement

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162. Droske, *New Battleground*, *supra* note 65, at 916.

163. *Id*.

164. *Id*. at 916 n.105 (referring to Doreen Hagen, *State Should Work Together with Tribal Governments*, ST. PAUL PIONEER PRESS, Aug. 7, 2005, at 11B).

165. Droske, *New Battleground*, *supra* note 65, at 916–19.

166. *Id*.

167. State v. Jones, 700 N.W.2d 556, 561 (Minn. Ct. App. 2005); Droske, *New Battleground*, *supra* note 65, at 916–19.

168. Droske, *New Battleground*, *supra* note 65, at 923 nn.149–50 (quoting *White Earth Reservation: Tribe Signs Predatory Offender's Code*, GRAND FORKS HERALD, Sept. 8, 2005, at B2) ("The tribe viewed its predatory offender registration law as a powerful expression of the White

with the Leech Lake tribe that mirrored the state's criminal/prohibitory jurisdiction and allowed Minnesota to carry out registration and notification functions.[169] One pragmatic reason why the Leech Lake tribe chose this plan was its inability to enforce the regulations independently.[170] Finally, Minnesota established cooperative agreements with the Shakopee and Grand Portage tribes that combined notions of tribal sovereignty with state resources and expertise.[171] These cooperative agreements stated that Minnesota would enforce its own registration and notification requirements in the event that the offender failed to follow tribal registration rules.[172]

In short, the experience of Minnesota and its tribes reveals that cooperative agreements between tribes and states are a vital option to establishing sex offender registration programs that both satisfy the AWA and meet the varying needs of tribes.[173] In turn, states benefit from the knowledge of tribal leaders as to how best to carry out the program within tribes.[174] As critics of the AWA have suggested, "To effectively monitor sex offenders within tribal communities, the tribal governments must be involved."[175] Laura L. Rogers, the U.S. Justice Department director of the SMART office, has agreed: "[W]hether you represent a tribe, you represent a local entity or you represent your state . . . we all need to work together in this effort."[176]

C. Promoting Current Federal Indian Law Policy of Promoting Tribal Sovereignty

Amending section 127 would also promote the current federal Indian law policy of promoting tribal sovereignty. Critics of Public Law 280 have contended that the delegation of jurisdiction constitutes a "unilateral imposition of jurisdiction over tribes [that] severely infringes upon tribal

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Earth Nation's 'inherent sovereignty,' and felt the statute would 'preserve the peace, harmony, and safety' of the White Earth community, and effectively 'register and prosecute predatory offenders.'").

169. Droske, *New Battleground*, *supra* note 65 at 925–26 ("[S]ince members of the tribal government believed that the State had done an excellent job in implementing its registration laws and did not want to water down the law's effectiveness by reducing the criminal penalties from a felony to a misdemeanor, the tribe chose to turn enforcement back to the State.").

170. *Id*.

171. *Id*. at 927.

172. *Id*.

173. *Id*. at 928 ("The collaborative relationship the tribes and the Attorney General have entered into, and the solutions as a result of these collaborative negotiations, serve as an important model for other States and tribes that have not yet confronted this issue.").

174. Deer, *supra* note 9.

175. *Id*.

176. Gramlich, *supra* note 99.

sovereignty . . . inconsistent with current federal policy."[177] From the beginning, tribes have opposed Congress's decision to delegate criminal and civil/adjudicatory jurisdiction to states without their consent—the decision blatantly infringed on tribal sovereignty.[178] Consequently, amending section 127 to reflect the position that AWA registration and notification provisions are civil/regulatory laws promotes tribal sovereignty and self-government.[179]

Additionally, construing the AWA sex offender registration provisions as civil/regulatory laws would promote tribal sovereignty by promoting tribe-state cooperative agreements.[180] As Robert Bohn, lawyer for the Leech Lake Band of Ojibwe in Minnesota, mentioned at the Federal Bar conference, "Far from being an abdication of tribal sovereignty, we believe this was an extension of our cooperative law enforcement agreement and was the *ultimate expression of government-to-government relations.*"[181]

V. CONCLUSION

Since July 27, 2006, Indian tribes have challenged that the AWA departs from current federal Indian law and policy favoring tribal sovereignty. On one hand, non-Public Law 280 tribes concede that the AWA delegates sex offender registration and notification responsibilities to tribes. However, non-Public Law 280 tribes challenge that the financial obstacles to establishing a sex offender registration and notification programs, coupled with the threat of retrocession for failure to comply, constitutes a de facto[182] delegation of sex offender registration and notification responsibilities to the states. Therefore, although the AWA does not purport to encroach upon non-Public Law 280 tribes' sovereignty, it threatens to encroach severely upon tribal sovereignty unless tribal registration and notification programs receive funding at the outset.

On the other hand, Public Law 280 tribes argue that the AWA departs from the current Public Law 280 delegation of criminal/prohibitory and civil/adjudicatory jurisdiction where it delegates sex offender registration and

177. Garrison, *supra* note 53, at 451.

178. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 543 (1975); *see also* WILLIAM A. BROPHY & SOPHIE D. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 186 (1966) (Even President Eisenhower lamented that Congress's decision to pass Public Law 280 without Indian tribes' consent gave him "grave doubts.").

179. *See generally* NCAI Resolution, *supra* note 7; Droske, *New Battleground*, *supra* note 65.

180. *See generally* NCAI Resolution, *supra* note 7; Droske, *New Battleground*, *supra* note 65.

181. Indianz.com, *Tribes Face Deadline to Join National Sex Offender Registry* (Apr. 30, 2007), http://www.indianz.com/News/2007/002661.asp (emphasis added).

182. "Actual; existing in fact; having effect even though not formally or legally recognized." BLACK'S LAW DICTIONARY 448 (8th ed. 2004).

notification responsibilities to the states. Although the Wisconsin and Minnesota supreme courts suggest otherwise, the Public Law 280 tribes' argument has some merit, for federal district courts have rejected criminal defendants' Ex Post Facto Clause challenges by construing the AWA registration provision as civil laws, not criminal laws.

Taken together, Congress should consider amending section 127 of the AWA to (1) strike provisions that unilaterally delegate sex offender registration and notification responsibilities to the states and (2) require that both non-Public Law 280 and Public Law 280 tribes and states adopt cooperative agreements to establish sex offender registration and notification programs that comply with the AWA. Congress has previously required tribes and states to adopt cooperative agreements where courts have held that states may not regulate certain conduct within Indian country—gaming. Additionally, amending section 127 would both allow tribes and states to establish custom-fit agreements to carry out the sex offender registration and notification functions and promote current federal Indian law and policy favoring tribal sovereignty. Ultimately, Congress's decision to amend section 127 would resist implicit efforts to swing the federal Indian law and policy "pendulum"[183] toward oppressing Indian tribes.

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183. *See* EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 11–12 (1989); PEVAR, *supra* note 12, at 4 (citing ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW vi–vii (3d ed. 1991)).

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